STATE OF MICHIGAN

COURT OF APPEALS

SHARON DONOHUE and KEVIN DONOHUE, Plaintiffs-Appellants, v INTERMODAL TRANSPORTATION SERVICES, INC, Defendant-Appellee.	UNPUBLISHED January 11, 2005 No. 249700 Oakland Circuit Court LC No. 02-041818-NZ

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right from an order of dismissal that was entered after the trial court granted defendant's motion for summary disposition of her age and gender discrimination claims pursuant to MCR 2.116(C)(10). We affirm.

I. Basic Overview

In 1989, plaintiff began working for defendant, Intermodal Transportation Services, Inc., who provides third-party vehicle inspection services to companies that ship new or used vehicles. As an account executive, plaintiff handled all of defendant's damaged-in-transit (DIT) accounts,[2] and Chrysler's new car account. In 1999, defendant decided to consolidate regions of its operations department, and to terminate two account executives from the sales and marketing department, Bob Mignosa (age fifty-one) and Don Sprow (age fifty-seven). Another account executive, aged fifty-one, was apparently later terminated for reasons relating to performance.

According to defendant, in December 2001 it was determined that further cutbacks were necessary. At a meeting held in New Jersey, a decision was made to eliminate the sales and marketing department, and to eliminate some account executives positions by transferring those

[1] Plaintiff's husband, Kevin Donohue, alleges a claim for loss of consortium. Because his claim is only derivative, the designation "plaintiff" refers to Sharon Donohue only.

[2] The DIT accounts refer to inspections of new vehicles that had been damaged either before acceptance of them by the transportation company or upon delivery to their final destination.

responsibilities to the operations department. On February 18, 2002, defendant terminated plaintiff (age forty-eight), and another account executive, Lew Schonberg (age sixty-two).

Plaintiff subsequently commenced this action, alleging age and gender discrimination under the Michigan civil rights act, MCL 37.2101, *et seq*. Defendant filed a motion for summary disposition, alleging that plaintiff was discharged as part of a workforce reduction motivated by economic necessity, not because of discrimination. The trial court denied defendant's motion, concluding there was "very little evidence on that issue." The trial court stated it was "unwilling to rule out the possibility that [p]laintiff may prevail." Defendant later renewed its motion supported by additional evidence. The trial court granted defendant's second motion and subsequently denied plaintiff's motion for reconsideration.

II. Age and Gender Discrimination Claims

A. Standard of Review

A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists.[3] *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). Summary disposition is appropriate when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

B. Analysis

A claim of disparate treatment can be proven by either direct or circumstantial evidence of intentional discrimination. *Bachman v Swan Harbour Associates*, 252 Mich App 400, 432; 653 NW2d 415 (2002), quoting *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539-540; 620 NW2d 836 (2001). Direct evidence of discrimination is evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133; 666 NW2d 186 (2003); *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001).

Contrary to plaintiff's argument, she has failed to produce any direct evidence of discrimination. Although she presented evidence that concerns were expressed at a company meeting that further cutbacks and the elimination of some positions might create an appearance

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[3] Contrary to plaintiff's argument, the test is not whether a record *may be* developed upon which reasonable minds may differ, nor whether the court is satisfied that the nonmoving party cannot prevail at trial because of a deficiency that cannot be overcome. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455 and n 2; 597 NW2d 28 (1999).

of discrimination, that non-lawyer executives question whether layoffs conform with the CRA does not give rise to an inference of discrimination. Given the propensity for employment litigation following layoffs, the failure to question the legal propriety of such layoffs would evidence a dereliction of duty by the persons charged with making decisions to reduce the workforce. Moreover, such discussions do not "require[] the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Sniecinski, supra* at 132-133.

Plaintiff also asserts as additional direct evidence of discrimination that James Deal was told that the company was only taking young male executives to management school in Switzerland. However, Deal believed that Neil Van Brakle was repeating what someone else told him. Plaintiff surmises that this other person was John McHale, who was directly above Van Brakle in the chain of command. However, plaintiff did not specifically ask McHale about this during his deposition. Plaintiff has not demonstrated that this alleged statement is not hearsay, nor does she argue that it would otherwise be admissible under a hearsay exception. Only "substantively admissible evidence" may be considered in determining whether a question of material fact exists to defeat summary disposition. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Therefore, plaintiff's reliance of this evidence is misplaced.

To establish a prima facie case of age discrimination through indirect evidence, a plaintiff is required to prove by a preponderance of the evidence that (1) she was a member of the protected class; (2) he suffered an adverse employment action; (3) she was qualified for the position; but (4) she was discharged under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Once a plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises.

Here, there is no dispute that plaintiff is a member of the protected class, suffered an adverse employment action, and was qualified for the position. Plaintiff contends that statistical evidence indicates that she was discharged under circumstances that give rise to an inference of unlawful discrimination. Plaintiff presented evidence that of eleven account executives and their supervisor, five persons were terminated, all over the age of forty-eight, and, of the seven remaining account executives, two were over the age of fifty, Don Smith and Bob Boehm, but the rest were between twenty-five and thirty-five years old. Plaintiff then notes that the median age of the account executives who were terminated was fifty-six, while the median age of the account executives who were retained was thirty-two. Further, plaintiff argues that excluding Smith and Boehm from the calculation, that the average age of those discharged was fifty-seven, while the average age of those retained was 30.8.[4]

[4] The average age of those retained with Smith and Boehm is 38.7. Plaintiff suggests that Smith and Boehm ought not to be included in this calculation because Smith, a former General Motors employee was in charge of the GM account and was uniquely qualified to retain the GM business and Boehm handled marine accounts and no one else within the company was qualified to handle marine accounts. This evidence actually works against plaintiff's theory. This evidence shows
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Plaintiff also offers a larger sample of management employees that had been laid-off. According to plaintiff, the average age of other management employees laid off during the relevant time period was fifty (median was 50.5), while the average age of management employees retained was forty-five (median forty-six). When account executives were included in the calculation, the average age of those laid of was fifty-two (median fifty-one), while the average age of those retained was forty-four (median forty-six).

This evidence shows only that some older employees were terminated while younger employees were retained. This is the kind of evidence that our Supreme Court has found to be insufficient, standing alone, to establish a prima facie case of age discrimination. *Hazle, supra*. However, plaintiff relies on *Featherly v Teledyne Ind's, Inc*, 194 Mich App 352, 360; 486 NW2d 361 (1992), a case in which the plaintiffs presented evidence that "the median age of the laid-off supervisors was fifty-five, the median age of those retained was "forty-four, and that no supervisor under the age of fifty-one was laid off." In considering the defendant's argument that these statistics distorted the evidence "because the average age of the retained supervisors dropped by only one year after the . . . layoffs," this Court stated:

> Although the statistical evidence presented in this case may provide only weak circumstantial evidence of age discrimination, it nonetheless constitutes some factual support for the claim, especially when conjoined with the other facts evidencing age discrimination. [*Featherly, supra* at 360-361.]

Although this case is distinguishable from *Featherly*, we accept the trial court's conclusion that plaintiff's statistical evidence shows "weak circumstantial evidence of age discrimination." When presented in light most favorable to plaintiff, and without considering defendant's proffered explanation of the termination decision, this evidence is sufficient to establish an inference that defendant engaged in unlawful discrimination. Accordingly, plaintiff has initially established a prima facie case of age discrimination.

The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination to overcome and dispose of this presumption. *Lytle, supra* at 173. Defendant's most comprehensive explanation for plaintiff's job loss is found in the following answer to plaintiff's interrogatory.

> The DIT accounts were transferred to the operations group where they are managed by a regional manager and assigned to clerical employees known as account coordinators. The DIT accounts were reassigned because the company made the decision to no longer solicit new DIT accounts. Since there is no solicitation of new accounts, an account executive was not needed to handle them.

This answer is consistent with plaintiff's claim that McHale told her "[plaintiff's] DIT accounts did not fit into the future of the company." Further, McHale's affidavit states that:

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that, at least with respect to GM and marine accounts, decisions relating to the reduction in workforce were based upon what was perceived to be best for the company bottom line.

> At the December 2001 meeting in Fairfield, New Jersey, we decided to eliminate the account executive position for [DIT] accounts. The DIT accounts could be maintained at the respective branch offices and did not require a full time employee. Since [plaintiff] was responsible for DIT accounts, it was determined that she would be terminated because her position was being eliminated.

Defendant has established that plaintiff's termination was the result of a reduction in force (RIF):

> A layoff in the context of an overall workforce reduction provides a nondiscriminatory explanation for the plaintiff's discharge. This puts the plaintiff's case in the same posture as it would be after the employer articulates *any* legitimate nondiscriminatory explanation in response to the plaintiff's prima facie case. Once the employer offers such an explanation, the presumption of the prima facie case—that the employee's discharge was discriminatory—evaporates and is no longer relevant. The plaintiff can no longer rely on the inference of discrimination in the prima facie case, and the evidence must be evaluated in light of the rational inferences it will support. The question is whether the plaintiff presented sufficient evidence, taken in a favorable light, to find that age discrimination was a determining factor in the decision to discharge the plaintiff. [*Town v Michigan Bell Telephone Co*, 455 Mich 688, 702-703; 568 NW2d 64 (1997) (emphasis in original).]

Further, plaintiff bears the burden of showing "that the defendant's reasons were not the true reasons, but a mere pretext for discrimination," and that "a protected characteristic . . . made a difference in the contested employment decision." *Hazle, supra* at 465-466.

Here, there is no evidence suggesting that defendant's proffered reason for plaintiff's termination was mere pretext. There is no dispute that plaintiff's position was eliminated, and there is no evidence that defendant has hired anyone else to assume plaintiff's duties. The record reflects that plaintiff's DIT accounts were distributed among clerical workers, and not re-assigned to retained account executives. Further, plaintiff's new-car marketing account was assigned to an existing account executive. Moreover, as noted by the McHale deposition, plaintiff's position was eliminated because the company determined not to solicit new DIT accounts. Nothing in the record suggests that defendant continues to solicit new DIT accounts.

Plaintiff responds by claiming that the reason she was given by McHale regarding her termination, the elimination of the sales and marketing division, was mere pretext because the division was later re-established. However, in this regard, plaintiff is attempting to question the defendant's wisdom in initially choosing to eliminate the sales and marketing division. Courts are not to second-guess an employer's "business judgment." *Hazle, supra* at 475-476. In other words, a plaintiff "cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Id.* at 476, quoting *Town, supra* at 704.

Plaintiff's position appears to hinge on a claim that in an RIF case, an employer must explain why it chose to terminate one qualified employee rather than another. See *Haroldson v*

Omni Enterprise, 901 P2d 426,431 (Ala, 1995), but see *Barnes v Gencorp, Inc*, 896 F2d 1457, 1465 (CA 6, 1990). Here, however, defendant explained that it chose to terminate plaintiff on the basis that she handled accounts that were no longer going to be handled. No other account executive possessed this objective criterion. While plaintiff claims she was more qualified than other retained younger account executives, no other account executive had accounts that could be distributed among clerical employees. Thus, plaintiff has not shown that her age, rather than position she held, made the difference in the contested employment decision. *Hazle*, *supra* at 466.

Therefore, plaintiff has failed to show any discriminatory motive on defendant's part, and summary disposition of the age discrimination claim was properly granted.

ii. Gender Discrimination

There is even less evidence supportive of plaintiff's gender discrimination claim. Plaintiff has shown that she was the only woman out of eleven account executives, and that, among defendant's sixty-three management employees-not including account executives-only eight were women. But plaintiff presented no evidence to support her claim that gender was a consideration in her termination, the assignments of remarketing accounts, or defendant's failure to offer her another position.

For the same reasons that plaintiff failed to show that age was a motivating factor in defendant's decision to terminate her employment, plaintiff has also failed to show that gender was a motivating factor in that decision. Further, the record reflects that plaintiff only once requested that she be assigned a remarketing account. At the time the request was made, plaintiff was told that all the remarketing accounts were currently being handled by other account executives. Plaintiff does not dispute the legitimacy of this response, and fails to provide further evidence that gender was motivating factor in this decision. Finally, there is no evidence that plaintiff ever requested a transfer within the company, and this claim accordingly fails.

We therefore conclude that the trial court did not err in granting defendant's motion for summary disposition.

III. Motion for Reconsideration

Next, plaintiff argues that the trial court erred in denying their motion for reconsideration. We disagree.

A. Standard of Review

A trial court's decision on a motion for rehearing or reconsideration is reviewed for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

B. Analysis

MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by

> the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Contrary to what plaintiff argues, McHale was not asked whether he told Van Brakle that only young male employees would be taken to Switzerland. He was asked about the training itself. He also testified that he was Van Brakle's direct superior. However, this information was already available from other witness and defendant's organizational chart. Plaintiff has not established by admissible evidence that someone told Van Brakle that only young male employees would be taken to Switzerland.

Similarly, the data concerning all management employees, while certainly encompassing a larger sample, shows nothing more than the data involving the smaller sample, i.e., that some older employees were laid off while younger employees were not. As discussed previously, plaintiff has not shown that defendant's reason for terminating plaintiff was mere pretext or that her age or gender made a difference in the contested employment decision. Plaintiffs failed to show that the trial court committed a palpable error in granting defendant's motion for summary disposition. Therefore, the trial court did not abuse its discretion in denying plaintiffs' motion for reconsideration.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot